



This document is scheduled to be published in the Federal Register on 11/18/2014 and available online at <http://federalregister.gov/a/2014-27277>, and on FDsys.gov

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2012–5]

Verification of Statements of Account Submitted by Cable Operators and Satellite Carriers

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The U.S. Copyright Office is adopting a final rule that establishes a new regulation allowing copyright owners to audit the statements of account that cable operators and satellite carriers file with the Office reflecting royalty payments due for secondary transmissions of copyrighted broadcast programming made pursuant to statutory licenses.

DATES: Effective on [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at jcharlesworth@loc.gov, or by telephone at 202-707-8350; Erik Bertin, Assistant General Counsel, by email at ebertin@loc.gov, or by telephone at 202-707-8350; or Sy Damle, Special Advisor to the General Counsel, by email at sdam@loc.gov, or by telephone at 202-707-8350.

SUPPLEMENTARY INFORMATION:

I. Background.

Sections 111 and 119 of the Copyright Act (the “Act”), Title 17 of the United States Code, allow cable operators and satellite carriers to retransmit programming that broadcast television stations transmit via over-the-air broadcast signals. To use these statutory licenses, cable operators and satellite carriers are required to file statements of account (“SOAs”) and deposit royalty fees with the U.S. Copyright Office (“Office”) on a semi-annual basis. The Office invests these royalties in United States Treasury securities pending distribution of the funds to copyright owners that are entitled to receive a share of the royalties.

The Satellite Television Extension and Localism Act of 2010 (“STELA”), Pub. L. No. 111-175, amended the Act by directing the Register of Copyrights to issue regulations to allow copyright owners to audit the SOAs and royalty fees that cable operators and satellite carriers file with the Office. Section 119(b)(2) of the Act directs the Register to “issue regulations to permit interested parties to verify and audit the statements of account and royalty fees submitted by satellite carriers under this subsection.” 17 U.S.C. 119(b)(2). Similarly, section 111(d)(6) directs the Register to “issue regulations to provide for the confidential verification by copyright owners whose works were embodied in the secondary transmissions of primary transmissions pursuant to [section 111] of the information reported on the semiannual statements of account filed under this subsection for accounting periods beginning on or after January 1, 2010, in order that the auditor designated under subparagraph [111(d)(6)(A)] is able to confirm the correctness of the calculations and royalty payments reported therein.” 17 U.S.C. 111(d)(6).

On June 14, 2012, the Office issued a Notice of Proposed Rulemaking that set forth its initial proposal for the audit procedure (the “First Proposed Rule”). *See* 77 FR 35643 (June 14, 2012). In drafting this proposal the Office considered similar audit regulations that the Office developed for parties that make ephemeral recordings or transmit digital sound recordings under 17 U.S.C. sections 112(e) and 114(f), respectively, or manufacture, import, and distribute digital audio recording devices under 17 U.S.C. chapter 10. The Office also considered a joint proposal (“the Petition for Rulemaking”) that was submitted by the Motion Picture Association of America, Inc. (“MPAA”), its member companies, and other companies that produce and distribute movies, series, and specials that are broadcast on television (the “Program Suppliers”), as well as other groups that represent copyright owners that share in the royalties paid by the cable and satellite industries.¹

The Office received extensive comments on the First Proposed Rule from groups representing copyright owners,² cable operators,³ and individual companies that retransmit broadcast programming under sections 111 or 119 of the Act, namely, AT&T,

¹ The groups that joined the Program Suppliers in submitting the Petition for Rulemaking included the Joint Sports Claimants (professional and college sports programming), National Association of Broadcasters (“NAB”) (commercial television programming), Commercial Television Claimants (local commercial television programming), Broadcaster Claimants Group (U.S. commercial television stations), American Society of Composers, Authors and Publishers (“ASCAP”) (musical works included in television programming), Broadcast Music, Inc. (“BMI”) (same), Public Television Claimants (noncommercial television programming), Public Broadcasting Service (“PBS”) (same), National Public Radio (“NPR”) (noncommercial radio programming), Canadian Claimants Group (Canadian television programming), and Devotional Claimants (religious television programming).

² The copyright owners that submitted comments on the First Proposed Rule included the Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Broadcaster Claimants Group, ASCAP, BMI, SESAC, Inc., Public Television Claimants, Canadian Claimants Group, Devotional Claimants, and NPR. Although the NAB and PBS joined their fellow copyright owners in submitting the Petition for Rulemaking, they did not submit any comments in this proceeding.

³ The National Cable & Telecommunications Association (“NCTA”) and the American Cable Association (“ACA”) filed comments on the First Proposed Rule on behalf of cable operators.

Inc., DIRECTV, LLC, and DISH Network L.L.C.⁴ In lieu of reply comments, DIRECTV, the NCTA, and a group representing certain copyright owners⁵ submitted a joint proposal for revising the First Proposed Rule. This group referred to themselves collectively as the “Joint Stakeholders,” and they urged the Office to incorporate their suggestions “as promptly as possible after receiving any further public comment.” JS First Submission at 1.⁶

The Office carefully studied the Joint Stakeholders’ proposal and the other comments submitted in response to the First Proposed Rule. The Joint Stakeholders’ proposal addressed many of the concerns that the parties raised in their initial comments. The Office therefore incorporated most of the Joint Stakeholders’ suggestions into a revised proposed regulation (the “Second Proposed Rule”).

On May 9, 2013, the Office published the Second Proposed Rule in the *Federal Register* and invited AT&T, DISH, the ACA, the Broadcaster Claimants Group, the Commercial Television Claimants, and other interested parties to comment on the proposed regulation. The Office also invited reply comments from the Joint Stakeholders and other interested parties. *See* 78 FR 27137, 27138 (May 9, 2013). The Office received comments from AT&T and the ACA, and it received reply comments from the ACA, the NCTA, and a group representing the copyright owners that negotiated the Joint

⁴ Citations to the comments submitted in response to the First Proposed Rule are abbreviated “[Name of Party] First Comment.”

⁵ The copyright owners that joined the NCTA and DIRECTV in submitting the Joint Stakeholders’ proposal included the Program Suppliers, Joint Sports Claimants, ASCAP, BMI, SESAC, Public Television Claimants, Canadian Claimants Group, Devotional Claimants, and NPR. The Commercial Television Claimants, the Broadcaster Claimants Group, the NAB, and PBS did not join their fellow copyright owners in submitting this proposal.

⁶ Citations to the proposals submitted by the Joint Stakeholders are abbreviated “JS First Submission” and “JS Second Submission.”

Stakeholders' Proposal with the NCTA and DIRECTV.⁷ The parties raised a number of complex issues, including issues of first impression that were not addressed in the comments or reply comments submitted in response to the First Proposed Rule.

On December 26, 2013, the Office issued an interim rule that addresses a procedural issue that was not contested by the parties (the "Interim Rule"). Specifically, the Interim Rule allows copyright owners to identify any SOAs from accounting periods beginning on or after January 1, 2010 that they intend to audit. At the same time, it provides licensees with advance notice of the SOAs that will be subject to audit when this final rule goes into effect. *See* 78 FR 28257 (Dec. 26, 2013).

After analyzing the comments submitted in response to the Second Proposed Rule, the Office identified a number of issues that were not addressed in the prior proposals. Because the Office believed these issues might be narrowed through group discussion, it decided to convene a public roundtable before issuing another notice of proposed rulemaking. *See* 79 FR 31992 (June 3, 2014). During the roundtable the Office received valuable input from parties that previously submitted comments in this proceeding, including the MPAA, the Commissioner of Baseball, the NCTA, the ACA, and DIRECTV. The Office also received guidance from the Royalty Review Council ("RRC"),⁸ a company that conducts audits on behalf of content owners and licensees in the music industry.

⁷ Citations to the comments submitted in response to the Second Proposed Rule are abbreviated "[Name of Party] Second Comment" and "[Name of Party] Second Reply." For example, citations to the copyright owners' reply comments are abbreviated "CO Second Reply." This group included all the copyright owners listed in footnote five except for the Commercial Television Claimants, the Broadcaster Claimants Group, the NAB, and PBS.

⁸ In its *Federal Register* document dated September 17, 2014 the Office erroneously referred to the Royalty Review Council by the name of its affiliated company, "Crunch Digital." 79 FR at 55696.

The issues discussed at the roundtable are summarized in the Office's *Federal Register* document dated June 3, 2014 (the "Roundtable Notice"). 79 FR 31992.

Following the roundtable, the Joint Stakeholders consulted with each other regarding three of these issues, namely: (i) whether there should be an initial consultation between the auditor and a representative of the licensee and the participating copyright owners prior to the commencement of an audit; (ii) the accounting standard that should govern the audit; and (iii) the procedure for allocating the cost of an audit between the participating copyright owners and the licensee. On July 31, 2014, the Joint Stakeholders informed the Office that they had reached a consensus on two of these issues and they offered specific recommendations for modifying certain aspects of the proposed rule.⁹ JS Second Submission at 1-2.

After reviewing the comments and reply comments submitted in response to the Second Proposed Rule, the input provided during the roundtable, and the Joint Stakeholders' Second Submission, the Office made several changes to the proposed rule (the "Third Proposed Rule"). On September 17, 2014, the Office published the Third Proposed Rule in the *Federal Register* and invited interested parties to comment on the revised proposal. 79 FR 55696. The Office received comments from the Program Suppliers and the NCTA on four aspects of the proposed rule, which are discussed in section II below.¹⁰ After reviewing these comments the Office has made modest changes to the proposal (discussed below) that are incorporated into the final rule (the "Final

⁹ The parties that submitted these recommendations are identified in footnote five.

¹⁰ Citations to the comments submitted in response to the Third Proposed Rule are abbreviated "[Name of Party] Third Comment." All of the comments submitted in this proceeding are posted on the Office's website at http://copyright.gov/docs/soaaudit/soa_audit.html.

Rule”). In addition, the Office has made minor technical amendments to the Final Rule that are summarized in footnotes 11, 13-15, and 17-21.¹¹

II. Discussion.

A. Accounting Standard.

In the Second Proposed Rule the Office proposed that audits be conducted according to generally accepted auditing standards (“GAAS”), but in the Roundtable Notice the Office questioned whether this would be an appropriate standard. 78 FR at 27151; 79 FR at 31994. At the roundtable RRC confirmed that accountants apply GAAS when auditing corporate financial statements, but indicated that those standards are not directly relevant to the type of audit contemplated by this rule. In RRC’s view, the auditor should not be required to apply a particular standard under the proposed rule; instead the parties should be encouraged to discuss this issue during an initial consultation about the conduct of the audit. 79 FR at 55701. For their part, the Joint Stakeholders were unable to reach agreement (either at the roundtable or in their written submissions) on what standard, if any, should be specified in lieu of GAAS. JS Second Submission at 1.

Given the lack of consensus on this issue, the Office decided to eliminate the provision that would require the auditor to apply a particular audit standard; instead, the Third Proposed Rule would allow the parties to review the “methodology” for the audit

¹¹ The Final Rule will supersede the Interim Rule in its entirety. Until the Final Rule becomes effective, copyright owners may use the Interim Rule to preserve their right to audit any SOA that was filed with the Office for accounting periods 2010-2 through 2014-1. (As of November 7, 2014 the Office has not received any notices filed pursuant to the Interim Rule.) The Final Rule clarifies that “[i]f the Office has received a notice of intent to audit prior to the effective date of this [rule],” it will publish a notice in the *Federal Register* within thirty days thereafter as contemplated by the Interim Rule, although the audit itself will be conducted in accordance with the Final Rule.

during the initial consultation. 79 FR at 55701. The Office also indicated that it had reached a final decision on this issue. *Id.* at 55697 n.11.

The NCTA urges the Office to reconsider its decision. NCTA Third Comment at 2. It notes that other regulations adopted by the Office contain express provisions directing auditors and accountants to apply GAAS or the attestation standards established by the American Institute of Certified Public Accountants (“AICPA”). *Id.* at 2 & n.5 (citing 37 C.F.R. §§ 210.17(f)(2)(i)(A) (attestation), 201.30(e) (GAAS); 260.6(e) (GAAS), 261.7(e) (GAAS), 262.7(e) (GAAS)). The NCTA worries that the failure to designate an appropriate standard for audits involving cable operators and satellite carriers could complicate and delay the verification process. *See id.* at 2-3. Instead, the NCTA suggests that the auditor should be required to apply the AICPA’s attestation standard as the “default” rule, but the parties should be allowed to modify that standard by mutual agreement. *Id.* at 2. The NCTA states that this “will provide the participants in the audit with helpful certainty” while giving them “the flexibility to adjust the standard if that would better serve the[ir] mutual interests.” *Id.* at 3.

The Office has considered the NCTA’s concerns, but concludes that it is unnecessary to specify a particular standard that should be applied in conducting audits under this Final Rule. Neither the NCTA nor any of the other parties provides any basis on which the Office can select a particular auditing standard that should govern these proceedings. Therefore, the Office is in no position to determine whether GAAS or attestation standards should be specified in the Final Rule (either as a mandatory requirement or as a default rule that would be subject to modification by the parties if they so agree). Instead, consistent with the recommendation of RRC (an experienced

auditor) the Final Rule gives the auditor the flexibility to apply a standard of review that – in his or her professional judgment – would be most appropriate for this type of audit. To ensure that the standard is made clear to the licensee, the Final Rule requires the parties to address the applicable auditing standard during the initial consultation.

B. Supplementary Royalty Payments.

The Third Proposed Rule specified that a licensee could cure underpayments identified in the auditor’s final report by depositing additional royalties with the Office. Paying additional royalties directly to the participating copyright owners pursuant to a negotiated settlement would not satisfy this requirement because, as the Office explained, this would unfairly prevent non-participating copyright owners from claiming an appropriate share of those payments. 79 FR at 55704.

The Program Suppliers object to the requirement that additional royalties be paid to the Office, contending that it will discourage negotiated settlements. PS Third Comment at 3. The Program Suppliers urge that such settlements offer “a fair and valuable means” for copyright owners and licensees to resolve their differences, and that the Third Proposed Rule will discourage such settlements from taking place. *Id.* at 1-3. They also contend that the Third Proposed Rule will create a free rider problem. *See id.* at 3. Copyright owners that decline to participate in the audit process will be entitled to claim a share of any additional royalties that are deposited with the Office as a result of the audit, but will not be required to pay for the auditor’s services. The Program Suppliers assert that this is unfair, because the participating copyright owners will be forced to pay for the audit but will receive only some of the resulting benefits. The Program Suppliers contend that negotiated settlements (*i.e.*, allowing a licensee to make

supplemental royalty payments directly to the participating copyright owners instead of depositing them with the Office) “would substantially reduce the free rider problem.”¹²

Id.

The Office has considered the Program Suppliers’ comments but declines to incorporate their suggestion into the Final Rule. The statute states that the auditor should be given the “exclusive authority” to audit an SOA and that the auditor should review that statement “on behalf of all copyright owners whose works were subject of secondary transmissions of primary transmissions by the [licensee] (that deposited the statement) during the accounting period covered by the statement.” 17 U.S.C. 111(d)(6)(A)(i). That is, the auditor should conduct the audit on behalf of any party that owns a copyrighted work that was embodied in a secondary transmission made by the licensee, regardless of whether that party decides to participate in the audit or not.¹³ *See* 77 FR at 35647.

The statute also provides that the Office “shall issue regulations” that “shall . . . establish a mechanism for the [licensee] to remedy any errors identified in the auditor’s report and to cure any underpayment identified.”¹⁴ 17 U.S.C. 111(d)(6)(C)(ii). In other words, Congress envisioned a regulatory procedure for curing underpayments that would

¹² Specifically, the Program Suppliers contend that the availability of negotiated settlements will encourage copyright owners to conduct a cost-benefit analysis when deciding whether to opt in or opt out of an audit. PS Third Comment at 3-4. If the possibility of obtaining a share of the additional royalties from the licensee outweighs the cost of participating in the audit, a copyright owner might decide to opt in; but if the certainty of avoiding those costs outweighs the risk of not receiving a share of the additional royalties, that party might decide to opt out. *See id.*

¹³ The auditor will review the statements that the licensee filed with the Office and the royalty payments reported therein, but the auditor will not audit the actual payments that the licensee deposited with the Office. To clarify this point, the Office removed the term “royalty fee payments” from the heading and paragraph (a) of the Final Rule.

¹⁴ In addition, the statute directs the Office to issue regulations that “require a consultation period for the independent auditor to review its conclusions with a designee of the [licensee].” 17 U.S.C. 111(d)(6)(C)(i). Under the Third Proposed Rule the auditor would be required to consult with the licensee “for no more than thirty days.” 79 FR at 55710. The Final Rule retains this requirement but clarifies that the auditor should consult with the licensee “for up to thirty days” since the auditor and the licensee may not need this much time in some cases.

be administered by the Office. Indeed, remedying an error in an SOA and curing any associated underpayment necessarily requires submission of a corrected statement and royalty payment to the Office; a private settlement with a specific copyright owner could not accomplish that objective. Accordingly, in response to Congress’s directive, the Office decided to use an existing administrative procedure that allows a licensee to cure underpayments by depositing additional royalties with the Office. *See* 77 FR at 35648. The Program Suppliers correctly note that any copyright owner would be allowed to claim an appropriate share of any additional royalties that are deposited with the Office as a result of this process, even if that party did not participate in the audit or pay for the auditor’s services.¹⁵ *See id.* at 35649; PS Third Comment at 2 (noting that section 111(d)(4) of the Copyright Act “entitles eligible [copyright] owners to share in all royalties contained in any year’s fund, no matter how [those funds were] collected (*e.g.*, additional royalties collected due to the Licensing Division’s SOA examination)”).

Although there is no legislative history for STELA, the approach that the Office adopted in the Final Rule is supported by the House Report for a prior version of the legislation. In that report, Congress indicated that following an audit, the licensee could cure any shortfall in royalty payments by using the ordinary method for correcting statements of account under the Office’s regulations, *i.e.*, filing amended statements of account and supplemental royalty fees with the Office: “The regulations should permit a cable operator... to amend its statement of account and to supplement its royalty

¹⁵ The Third Proposed Rule provided that other copyright owners may participate in the audit if they provide a written notice to the licensee and the party that filed the initial notice with the Office. It also provided that this notice should be sent to the Office at the address designated for time-sensitive requests. The Final Rule corrects this discrepancy by clarifying that the written notice should be sent to the Office, the licensee, and the party that filed the initial notice with the Office, and that notices submitted to the Office should be sent to the address specified in § 201.1(c)(1) of the regulations.

payments (subject to the filing fee and interest requirements generally applicable to late, corrected, or supplemental statements of account and royalty fees) to conform with the auditor's findings." H.R. Rep. No. 111-319, at 10 (2009).

The Program Suppliers consistently supported this approach throughout this proceeding. In their Petition for Rulemaking, the Program Suppliers and their fellow copyright owners encouraged the Office to establish a procedure that would allow a licensee to "cure any underpayment identified [in the auditor's report] (subject to the filing fee and interest requirements generally applicable to late, corrected, or supplemental Statements of Account and royalty fees)." Petition for Rulemaking, Ex. A, ¶ 9(iii), Ex. B. ¶ 9(iii). In other words, the Program Suppliers believed that licensees should be given an opportunity to cure an underpayment by submitting additional royalties to the Office (as opposed to paying them directly to the participating copyright owners). The Office included similar language in its First Proposed Rule and the Program Suppliers and their fellow copyright owners supported that proposal in their first round of comments.¹⁶

Likewise, in the Joint Stakeholders' First Submission, the Program Suppliers and their fellow copyright owners urged the Office to adopt a procedure that would allow a licensee to cure an "underpayment by filing with the Office an amendment to the Statement of Account and supplemental royalty fee payments utilizing the procedures set forth in sections 201.11(h) or 201.17(m)" of the Office's regulations. JS First

¹⁶ See 77 FR at 35648-49; CO First Comment at 8-9 (if the "auditor concludes that a licensee has not paid the appropriate royalties for the use of the license, the Office should require that a licensee who wishes to take advantage of STELA's safe harbor . . . must file a supplemental SOA and accompanying payment . . .").

Submission at 8. Once again, the Office incorporated that suggestion in both the Second and Third Proposed Rules. *See* 78 FR at 27144-45; 79 FR at 55704.

Contrary to the Program Suppliers' contention, the approach that the Office adopted in the Third Proposed Rule and the Final Rule does not "discourage" or "preclude negotiated settlements" between the participating copyright owners and the licensee. PS Third Comment at 1. The parties would still be able to discuss and agree to the amount of any additional royalties due from the licensee – presumably using the auditor's conclusions and the licensee's written rebuttal as reference points. If the parties reached a mutually acceptable agreement, the Final Rule would then require the licensee to deposit any additional payments with the Office for the benefit of all copyright owners.¹⁷ Notably, the Program Suppliers acknowledge that "direct deposit with the Copyright Office, [will] provide a valuable mechanism for avoiding infringement litigation related to royalty underpayment, thus furthering the object of the audit rights process." *Id.* at 4.

Even if the Final Rule might benefit some "free riders," the Program Suppliers do not suggest that this would dissuade all copyright owners from using the audit procedure. In fact, the participating copyright owners enjoy a number of benefits that are not available to copyright owners that do not elect to join the proceeding. As the Program Suppliers note, copyright owners that decline to participate "have no control over or interaction with the auditor." *See id.* at 2. Nor are they entitled to receive a copy of the

¹⁷ The Third Proposed Rule provided that the licensee may exercise its right to cure the deficiencies identified in the auditor's report provided that the licensee "reimburses" the participating copyright owners for any audit costs that the licensee is required to pay. *See* 79 FR at 55704. The Final Rule retains this requirement, but clarifies that the licensee must have "reimbursed" the participating copyright owners. While the additional royalties must be deposited with the Office, the Final Rule also clarifies that the audit costs should be paid to a representative of the participating copyright owners.

audit report, which could make it more difficult to take action if the licensee fails to cure any underpayments.

By contrast, the participating copyright owners can direct the audit process by selecting the licensee and the statements that are subject to audit,¹⁸ nominating the auditor who will review the licensee's records, and identifying issues or irregularities that the auditor should consider in his or her review. At the beginning of the audit, the participating copyright owners will receive a list of the broadcast signals that the licensee transmitted during the accounting periods that are subject to the audit, including the call sign for each broadcast signal and each multicast signal (as well as the classification of each signal on a community-by-community basis in an audit involving a cable system). *See* 79 FR at 55700. As the Program Suppliers and their fellow copyright owners noted in their second round of comments, this "provides tangible benefits" for the participating copyright owners by helping them to determine whether the licensee has correctly classified the carriage of each signal. *See* CO Second Reply at 9, 10.

At the conclusion of the audit, the participating copyright owners will receive a copy of the auditor's final report. Thus, they will have the benefit of the auditor's findings and analysis, as well as the information that the auditor cites in support of his or her conclusions. Presumably, the participating copyright owners could use this information to identify similar irregularities in the licensee's other statements that may warrant further review – either through an audit process, a negotiated settlement, or

¹⁸ The Third Proposed Rule provided that the copyright owners must prepare a written notice identifying both the licensee and the statements that they intend to audit, and they must file that notice with the Office in the month of December. The Final Rule retains this requirement but clarifies that the notice must be filed "on or after December 1st and no later than December 31st."

appropriate legal action.¹⁹ By contrast, the non-participating copyright owners would not be privy to this information, and would be foreclosed from initiating a separate audit with respect to the SOAs analyzed in the final report. *See* 77 FR at 35649; PS Third Comment at 3.

C. Conclusion of the Audit.

Under the Third Proposed Rule, a representative of the participating copyright owners would be required to notify the Office if the auditor discovered an underpayment or overpayment on any of the statements that were reviewed during the audit (although the amounts specified in the auditor's report would not have to be disclosed). The NCTA suggests that it would be more efficient for the auditor to inform the Office that the audit has been completed. NCTA Third Comment at 4. The Office agrees with the NCTA's suggestion and has incorporated it into the Final Rule.

The NCTA also states that there is no need for the auditor to share his findings with the Office. It contends that the auditor should file "a simple declaration" confirming that the audit "has been timely completed," but the auditor should not disclose whether he or she discovered an underpayment or overpayment on any of the statements that were reviewed. *Id.* The NCTA correctly notes that any document filed with the Office would become a public record, which means that the notification would be available to other copyright owners even if they declined to participate in the audit. *See id.* The NCTA states that there is no need to share this information with non-participating copyright owners, because the auditor would provide a final report to the participating copyright

¹⁹ For example, if the auditor discovered a net aggregate underpayment of more than 5% in an audit involving a multiple system operator ("MSO"), the copyright owners would be entitled to audit a larger sample of the cable systems owned by that entity. The Final Rule preserves this option but clarifies that the copyright owners must conduct a "new" initial audit and must notify the Office their intent to conduct "such" an audit.

owner (including the specific amount of any overpayment or underpayment that the auditor discovered). *Id.*

The Office did not include this suggestion in the Final Rule, because there are legitimate reasons for notifying the Office when the auditor discovers an overpayment or an underpayment and for making that information available to the public. Providing this information to the Office will alert both the Office and the copyright owners that did not participate in the audit of the possibility that additional royalty payments or refunds may be forthcoming, thus serving the interests of administrative efficiency. When the Office receives a notice of intent to audit a particular SOA, the Office can hold certain royalties to ensure that funds are available in the event that the licensee subsequently requests a refund. *See* 78 FR at 27146. If the auditor informs the Office that he or she found an overpayment on a particular statement, the Office can anticipate a potential refund request from the licensee. If the licensee fails to request a refund within the time allowed, the Office can release those funds. Conversely, if the auditor informs the Office that he or she found an underpayment on a particular statement, the Office will know that it may receive additional royalty deposits from the licensee.

The NCTA did not explain why this type of information should be withheld from the non-participating copyright owners and the Office can see no legitimate reason for keeping this information from the public. As discussed in section II.B, any party that owns the copyright in a work that was embodied in a secondary transmission made by a licensee that was subject to an audit is entitled to an appropriate share of additional royalties paid to the Office by that licensee – regardless of whether that party decided to participate in the audit. Thus, non-participating copyright owners have a legitimate

reason to know if a licensee overpaid or underpaid royalties (or paid the correct amount due).

Moreover, if the auditor discovers an underpayment and the licensee fails to deposit additional royalties with the Office, the non-participating copyright owners should be given an opportunity to consider how to protect their interests. The fact that the auditor discovered an underpayment may suggest that there could be similar problems with the licensee's other statements. In such cases, non-participating copyright owners may be inclined to conduct their own review of additional statements (although as discussed in section II.B they would not have the benefit of the information and analysis set forth in the auditor's final report). They also may be inclined to participate in future audits involving that licensee. Conversely, if the auditor determines that the licensee overpaid or paid the correct amount, the non-participating copyright owners may be inclined to focus their attention elsewhere.

The Final Rule also provides safeguards for licensees by protecting their confidential information.²⁰ The auditor must inform the Office if he or she discovers an overpayment or underpayment on a particular statement, but the auditor is not required to submit a copy of the final report or disclose the specific amounts reported therein. The auditor must also notify the Office if the licensee contests the auditor's findings but need not submit a copy of the licensee's rebuttal. This additional information will put non-participating copyright owners on notice that a licensee disputes the auditor's findings and may decline to pay the full amount (or any amount) of what the auditor found to be

²⁰ To protect the licensee's interests both during the audit and after it has been completed, the Final Rule clarifies that the parties shall protect the confidentiality of any non-public financial or business information pertaining to an SOA that "is the subject of an audit."

due. But because the auditor will not be submitting non-public financial or business information, such information will not be made public.

D. Retention of Records.

Under the Second Proposed Rule a statutory licensee would be required to retain any records needed to confirm the correctness of the calculations and royalty payments reported in an SOA or amended SOA for three and a half years after the last day of the year that the SOA or amendment was filed with the Office. None of the parties objected to this aspect of the proposal.

If an SOA or amended SOA is subject to an audit, then under the Second Proposed Rule, the licensee would be required to retain its records concerning that statement for another three years after the auditor delivered the final report to the parties. In an earlier round of comments, the NCTA contended that this would impose a burden on small cable operators as well as MSOs that file multiple SOAs in each accounting period. NCTA Second Reply at 4. Instead, the NCTA suggested that a licensee should be required to retain its records for no more than one year after the auditor issues his or her final report. *Id.*

The Office weighed the NCTA's concerns when it drafted the Third Proposed Rule, but concluded that a three-year retention period would be more appropriate, because it would ensure that the licensee does not discard its records before the three-year statute of limitations may expire. 79 FR at 55708. The Office also stated that it had reached a final decision on this issue. *Id.* at 55697 n.11.

In this third round of comments, the NCTA again urges the Office to reconsider its decision. NCTA Third Comment at 3. The NCTA notes that the Third Proposed Rule

would require the auditor to complete his or her review within less than a year, and notes that the Office cited the “administrative burdens associated with retaining records for extended periods” as one of the reasons for this requirement. *Id.*; *see also* 79 FR at 55699. To reduce these burdens even further, the NCTA reiterates that licensees should be required to retain their records for no more than one year after the completion of the audit. NCTA Third Comment at 3. It also contends that the Office should give more weight to the fact that the Joint Stakeholders mutually agreed that a one-year retention period would be sufficient to protect their respective interests. *Id.* at 4.

The Office has considered the NCTA’s renewed concerns, and has again concluded that a licensee should retain its records for three years after the auditor issues his or her final report. There is a significant difference between the burdens associated with maintaining records relating to all of the statements that a licensee has filed with the Office, and the burdens associated with maintaining records relating to a statement that has been subject to an audit. The Final Rule limits the number of statements that may be reviewed in an audit (ordinarily two SOAs²¹), which in turn limits the number of records that a particular licensee must retain when the auditor issues his or her final report. Many licensees collect, report, and maintain their records in electronic form, which also mitigates the burden. Moreover, the licensee is only required to keep such records as are “*necessary* to confirm the correctness of the calculations and royalty payments reported” in those SOAs (emphasis added).

²¹ The Third Proposed Rule provided that an audit of a particular cable system or satellite carrier could include no more than two of the statements filed by that licensee during “the previous eight accounting periods.” 79 FR at 55711. If the auditor discovered a net aggregate underpayment of more than 5%, the rule provided that the copyright owners may expand the audit to include “all previous Statements filed by that [licensee] that may be timely noticed for audit.” *Id.* The Final Rule maintains this approach, but in the interest of consistency it employs similar language in paragraphs (m)(2) and (n)(1).

List of Subjects in 37 CFR Part 201

Copyright, General Provisions.

Final Regulations

For the reasons set forth in the preamble, the U.S. Copyright Office amends 37 CFR part 201, as follows:

PART 201—GENERAL PROVISIONS

1. Revise the authority citation for part 201 to read as follows:

Authority: 17 U.S.C. 702.

2. Revise § 201.16 to read as follows:

§ 201.16 Verification of a Statement of Account for secondary transmissions made by cable systems and satellite carriers.

(a) *General.* This section prescribes procedures pertaining to the verification of a Statement of Account filed with the Copyright Office pursuant to sections 111(d)(1) or 119(b)(1) of title 17 of the United States Code.

(b) *Definitions.* As used in this section:

(1) The term *cable system* has the meaning set forth in § 201.17(b)(2).

(2) *Copyright owner* means any person or entity that owns the copyright in a work embodied in a secondary transmission made by a statutory licensee that filed a Statement of Account with the Copyright Office for an accounting period beginning on or after January 1, 2010, or a designated agent or representative of such person or entity.

(3) *Multiple system operator* or *MSO* means an entity that owns, controls, or operates more than one cable system.

(4) *Net aggregate underpayment* means the aggregate amount of underpayments found by the auditor less the aggregate amount of any overpayments found by the auditor,

as measured against the total amount of royalties reflected on the Statements of Account examined by the auditor.

(5) *Participating copyright owner* means a copyright owner that filed a notice of intent to audit a Statement of Account pursuant to paragraph (c)(1) or (2) of this section and any other copyright owner that has given notice of its intent to participate in such audit pursuant to paragraph (c)(3) of this section.

(6) The term *satellite carrier* has the meaning set forth in 17 U.S.C. 119(d)(6).

(7) The term *secondary transmission* has the meaning set forth in 17 U.S.C. 111(f)(2).

(8) *Statement of Account* or *Statement* means a semiannual Statement of Account filed with the Copyright Office under 17 U.S.C. 111(d)(1) or 119(b)(1) or an amended Statement of Account filed with the Office pursuant to §§ 201.11(h) or 201.17(m).

(9) *Statutory licensee* or *licensee* means a cable system or satellite carrier that filed a Statement of Account with the Office under 17 U.S.C. 111(d)(1) or 119(b)(1).

(c) *Notice of intent to audit.* (1) Any copyright owner that intends to audit a Statement of Account for an accounting period beginning on or after January 1, 2010 must provide written notice to the Register of Copyrights no later than three years after the last day of the year in which the Statement was filed with the Office. The notice must be received in the Office on or after December 1st and no later than December 31st, and a copy of the notice must be provided to the statutory licensee on the same day that it is filed with the Office. Between January 1st and January 31st of the next calendar year the Office will publish a notice in the FEDERAL REGISTER announcing the receipt of the notice of intent to audit. A notice of intent to audit may be filed by an individual

copyright owner or a designated agent that represents a group or multiple groups of copyright owners. The notice shall include a statement indicating that it is a “notice of intent to audit” and it shall contain the following information:

(i) It shall identify the licensee that filed the Statement(s) with the Office, and the Statement(s) and accounting period(s) that will be subject to the audit.

(ii) It shall identify the party that filed the notice, including its name, address, telephone number, and email address, and it shall include a statement that the party owns or represents one or more copyright owners that own a work that was embodied in a secondary transmission made by the statutory licensee during one or more of the accounting period(s) specified in the Statement(s) that will be subject to the audit.

(2) Notwithstanding the schedule set forth in paragraph (c)(1) of this section, any copyright owner that intends to audit a Statement of Account pursuant to an expanded audit under paragraph (n) of this section may provide written notice of such to the Register of Copyrights during any month, but no later than three years after the last day of the year in which the Statement was filed with the Office. A copy of the notice must be provided to the licensee on the same day that the notice is filed with the Office.

Within thirty days after the notice has been received, the Office will publish a notice in the FEDERAL REGISTER announcing the receipt of the notice of intent to conduct an expanded audit. A notice given pursuant to this paragraph may be provided by an individual copyright owner or a designated agent that represents a group or multiple groups of copyright owners. The notice shall include a statement indicating that it is a “notice of intent to conduct an expanded audit” and it shall contain the information specified in paragraphs (c)(1)(i) and (ii) of this section.

(3) Within thirty days after a notice is published in the FEDERAL REGISTER pursuant to paragraphs (c)(1) or (2) of this section, any other copyright owner that owns a work that was embodied in a secondary transmission made by that statutory licensee during an accounting period covered by the Statement(s) of Account referenced in the FEDERAL REGISTER notice and that wishes to participate in the audit of such Statement(s) must provide written notice of such participation to the Copyright Office as well as to the licensee and party that filed the notice of intent to audit. A notice given pursuant to this paragraph may be provided by an individual copyright owner or a designated agent that represents a group or multiple groups of copyright owners, and shall include the information specified in paragraphs (c)(1)(i) and (ii) of this section.

(4) Notices submitted to the Office under paragraphs (c)(1) through (3) of this section should be addressed to the “U.S. Copyright Office, Office of the General Counsel” and should be sent to the address for time-sensitive requests set forth in § 201.1(c)(1).

(5) Once the Office has received a notice of intent to audit a Statement of Account under paragraphs (c)(1) or (2) of this section, a notice of intent to audit that same Statement will not be accepted for publication in the FEDERAL REGISTER.

(6) Once the Office has received a notice of intent to audit two Statements of Account filed by a particular satellite carrier or a particular cable system, a notice of intent to audit that same carrier or that same system under paragraph (c)(1) of this section will not be accepted for publication in the FEDERAL REGISTER until the following calendar year.

(7) If the Office has received a notice of intent to audit prior to the effective date of this section, the Office will publish a notice in the FEDERAL REGISTER within thirty

days thereafter announcing the receipt of the notice of intent to audit. In such a case, the audit shall be conducted using the procedures set forth in paragraphs (d) through (l) of this section, with the following exceptions:

(i) The participating copyright owners shall provide the statutory licensee with a list of three independent and qualified auditors pursuant to paragraph (d)(1) by March 16, 2015.

(ii) The auditor shall deliver his or her final report to the participating copyright owners and the licensee pursuant to paragraph (i)(3) of this section by November 1, 2015.

(d) *Selection of the auditor.* (1) Within forty-five days after a notice is published in the FEDERAL REGISTER pursuant to paragraph (c)(1) of this section, the participating copyright owners shall provide the statutory licensee with a list of three independent and qualified auditors, along with information reasonably sufficient for the licensee to evaluate the proposed auditors' independence and qualifications, including:

(i) The auditor's *curriculum vitae* and a list of audits that the auditor has conducted pursuant to 17 U.S.C. 111(d)(6) or 119(b)(2);

(ii) A list and, subject to any confidentiality or other legal restrictions, a brief description of any other work the auditor has performed for any of the participating copyright owners during the prior two calendar years;

(iii) A list identifying the participating copyright owners for whom the auditor's firm has been engaged during the prior two calendar years; and,

(iv) A copy of the engagement letter that would govern the auditor's performance of the audit and that provides for the auditor to be compensated on a non-contingent flat fee or hourly basis that does not take into account the results of the audit.

(2) Within five business days after receiving the list of auditors from the participating copyright owners, the licensee shall select one of the proposed auditors and shall notify the participating copyright owners of its selection. That auditor shall be retained by the participating copyright owners and shall conduct the audit on behalf of all copyright owners who own a work that was embodied in a secondary transmission made by the licensee during the accounting period(s) specified in the Statement(s) of Account identified in the notice of intent to audit.

(3) The auditor shall be independent and qualified as defined in this section. An auditor shall be considered independent and qualified if:

(i) He or she is a certified public accountant and a member in good standing with the American Institute of Certified Public Accountants (“AICPA”) and the licensing authority for the jurisdiction(s) where the auditor is licensed to practice;

(ii) He or she is not, for any purpose other than the audit, an officer, employee, or agent of any participating copyright owner;

(iii) He or she is independent as that term is used in the Code of Professional Conduct of the AICPA, including the Principles, Rules, and Interpretations of such Code; and

(iv) He or she is independent as that term is used in the Statements on Auditing Standards promulgated by the Auditing Standards Board of the AICPA and Interpretations thereof issued by the Auditing Standards Division of the AICPA.

(e) *Commencement of the audit.* (1) Within ten days after the selection of the auditor, the auditor shall meet by telephone or in person with designated representatives of the participating copyright owners and the statutory licensee to review the scope of the

audit, audit methodology, applicable auditing standard, and schedule for conducting and completing the audit.

(2) Within thirty days after the selection of the auditor, the licensee shall provide the auditor and a representative of the participating copyright owners with a list of all broadcast signals retransmitted pursuant to the statutory license in each community covered by each of the Statements of Account subject to the audit, including the call sign for each broadcast signal and each multicast signal. In the case of an audit involving a cable system or MSO, the list must include the classification of each signal on a community-by-community basis pursuant to § 201.17(e)(9)(iv) through (v) and 201.17(h). The list shall be signed by a duly authorized agent of the licensee and the signature shall be accompanied by the following statement “I, the undersigned agent of the statutory licensee, hereby declare under penalty of law that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.”

(f) *Failure to proceed with a noticed audit.* If the participating copyright owners fail to provide the statutory licensee with a list of auditors or fail to retain the auditor selected by the licensee pursuant to paragraph (d)(2) of this section, the Statement(s) of Account identified in the notice of intent to audit shall not be subject to audit under this section.

(g) *Ex parte communications.* Following the initial consultation pursuant to paragraph (e)(1) of this section and until the distribution of the auditor’s final report to the participating copyright owners pursuant to paragraph (i)(3) of this section, there shall be no *ex parte* communications regarding the audit between the auditor and the

participating copyright owners or their representatives; provided, however, that the auditor may engage in such *ex parte* communications where either:

(1) Subject to paragraph (i)(4) of this section, the auditor has a reasonable basis to suspect fraud and that participation by the licensee in communications regarding the suspected fraud would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud; or

(2) The auditor provides the licensee with a reasonable opportunity to participate in communications with the participating copyright owners or their representatives and the licensee declines to do so.

(h) *Auditor's authority and access.* (1) The auditor shall have exclusive authority to verify all of the information reported on the Statement(s) of Account subject to the audit in order to confirm the correctness of the calculations and royalty payments reported therein; provided, however, that the auditor shall not determine whether any cable system properly classified any broadcast signal as required by § 201.17(e)(9)(iv) through (v) and 201.17(h) or whether a satellite carrier properly determined that any subscriber or group of subscribers is eligible to receive any broadcast signals under 17 U.S.C. 119(a).

(2) The statutory licensee shall provide the auditor with reasonable access to the licensee's books and records and any other information that the auditor needs in order to conduct the audit. The licensee shall provide the auditor with any information the auditor reasonably requests promptly after receiving such a request.

(3) The audit shall be conducted during regular business hours at a location designated by the licensee with consideration given to minimizing the costs and burdens

associated with the audit. If the auditor and the licensee agree, the audit may be conducted in whole or in part by means of electronic communication.

(4) With the exception of its obligations under paragraphs (d) and (e) of this section, a licensee may suspend its participation in an audit for no more than sixty days before the semi-annual due dates for filing Statements of Account by providing advance written notice to the auditor and a representative of the participating copyright owners, provided however, that if the participating copyright owners notify the licensee within ten days of receiving such notice of their good-faith belief that the suspension could prevent the auditor from delivering his or her final report to the participating copyright owners before the statute of limitations may expire on any claims under the Copyright Act related to a Statement of Account covered by that audit, the licensee may not suspend its participation in the audit unless it first executes a tolling agreement to extend the statute of limitations by a period of time equal to the period of the suspension.

(i) *Audit report.* (1) After reviewing the books, records, and any other information received from the statutory licensee, the auditor shall prepare a draft written report setting forth his or her initial conclusions and shall deliver a copy of that draft report to the licensee. The auditor shall then consult with a representative of the licensee regarding the conclusions set forth in the draft report for up to thirty days. If, upon consulting with the licensee, the auditor concludes that there are errors in the facts or conclusions set forth in the draft report, the auditor shall correct those errors.

(2) Within thirty days after the date that the auditor delivered the draft report to the licensee pursuant to paragraph (i)(1) of this section, the auditor shall prepare a final version of the written report setting forth his or her ultimate conclusions and shall deliver

a copy of that final version to the licensee. Within fourteen days thereafter, the licensee may provide the auditor with a written rebuttal setting forth its good faith objections to the facts or conclusions set forth in the final version of the report.

(3) Subject to the confidentiality provisions set forth in paragraph (l) of this section, the auditor shall attach a copy of any written rebuttal timely received from the licensee to the final version of the report and shall deliver a copy of the complete final report to the participating copyright owners and the licensee. The final report must be delivered by November 1st of the year in which the notice was published in the FEDERAL REGISTER pursuant to paragraph (c)(1) of this section and within five business days after the last day on which the licensee may provide the auditor with a written rebuttal pursuant to paragraph (i)(2) of this section. Upon delivery of the complete and final report, the auditor shall notify the Office that the audit has been completed. The notice to the Office shall specify the date that the auditor delivered the final report to the parties; whether, with respect to each statement examined, the auditor has discovered any underpayment or overpayment; and whether the auditor has received a written rebuttal from the licensee. The notice should be addressed to the “U.S. Copyright Office, Office of the General Counsel” and should be sent to the address for time-sensitive requests specified in § 201.1(c)(1).

(4) Prior to the delivery of the final report pursuant to paragraph (i)(3) of this section the auditor shall not provide any draft of his or her report to the participating copyright owners or their representatives; provided, however, that the auditor may deliver a draft report simultaneously to the licensee and the participating copyright owners if the auditor has a reasonable basis to suspect fraud.

(j) *Corrections, supplemental payments, and refunds.* (1) If the auditor concludes in his or her final report that any of the information reported on a Statement of Account is incorrect or incomplete, that the calculation of the royalty fee payable for a particular accounting period was incorrect, or that the amount deposited in the Office for that period was too low, a statutory licensee may cure such incorrect or incomplete information or underpayment by filing an amendment to the Statement and, in case of a deficiency in payment, by depositing supplemental royalty fee payments with the Office using the procedures set forth in §§ 201.11(h) or 201.17(m); provided, however, that the amendment and/or payments are received within sixty days after the delivery of the final report to the participating copyright owners and the licensee or in the case of an audit of an MSO, within ninety days after the delivery of such report; and further provided that the licensee has reimbursed the participating copyright owners for the licensee's share of the audit costs, if any, determined to be owing pursuant to paragraph (k)(3) of this section. While reimbursement of audit costs shall be paid to a representative of the participating copyright owners, supplemental royalty fee payments made pursuant to this paragraph shall be delivered to the Office and not to the participating copyright owners or their representatives.

(2) Notwithstanding §§ 201.11(h)(3)(i) and 201.17(m)(4)(i), if the auditor concludes in his or her final report that there was an overpayment on a particular Statement, the licensee may request a refund from the Office using the procedures set forth in §§ 201.11(h)(3) or 201.17(m)(4), provided that the request is received within sixty days after the delivery of the final report to the participating copyright owners and

the licensee or within ninety days after the delivery of the final report in the case of an audit of an MSO.

(k) *Costs of the audit.* (1) No later than the fifteenth day of each month during the course of the audit, the auditor shall provide the participating copyright owners with an itemized statement of the costs incurred by the auditor during the previous month, and shall provide a copy to the licensee that is the subject of the audit.

(2) If the auditor concludes in his or her final report that there was no net aggregate underpayment or a net aggregate underpayment of five percent or less, the participating copyright owners shall pay for the full costs of the auditor. If the auditor concludes in his or her final report that there was a net aggregate underpayment of more than five percent but less than ten percent, the costs of the auditor are to be split evenly between the participating copyright owners and the licensee that is the subject of the audit. If the auditor concludes in his or her final report that there was a net aggregate underpayment of ten percent or more, the licensee will be responsible for the full costs of the auditor.

(3) If a licensee is responsible for any portion of the costs of the auditor, a representative of the participating copyright owners shall provide the licensee with an itemized accounting of the auditor's total costs, the appropriate share of which should be paid by the licensee to such representative no later than sixty days after the delivery of the final report to the participating copyright owners and licensee or within ninety days after the delivery of such report in the case of an audit of an MSO.

(4) Notwithstanding anything to the contrary in paragraph (k) of this section, no portion of the auditor's costs that exceed the amount of the net aggregate underpayment may be recovered from the licensee.

(l) *Confidentiality.* (1) For purposes of this section, confidential information shall include any non-public financial or business information pertaining to a Statement of Account that is the subject of an audit under 17 U.S.C. 111(d)(6) or 119(b)(2).

(2) Access to confidential information under this section shall be limited to:

(i) The auditor; and

(ii) Subject to the execution of a reasonable confidentiality agreement, outside counsel for the participating copyright owners and any third party consultants retained by outside counsel, and any employees, agents, consultants, or independent contractors of the auditor who are not employees, officers, or agents of a participating copyright owner for any purpose other than the audit, who are engaged in the audit of a Statement or activities directly related hereto, and who require access to the confidential information for the purpose of performing such duties during the ordinary course of their employment.

(3) The auditor and any person identified in paragraph (l)(2)(ii) of this section shall implement procedures to safeguard all confidential information received from any third party in connection with an audit, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the auditor or such person.

(m) *Frequency and scope of the audit.* (1) Except as provided in paragraph (n)(2) of this section with respect to expanded audits, a cable system, MSO, or satellite carrier shall be subject to no more than one audit per calendar year.

(2) Except as provided in paragraph (n)(1) of this section, the audit of a particular cable system or satellite carrier shall include no more than two of the Statements of Account filed by that cable system or satellite carrier that may be timely noticed for audit under paragraph (c)(1) of this section.

(3) Except as provided in paragraph (n)(3)(ii) of this section, an audit of an MSO shall be limited to a sample of no more than ten percent of the MSO's Form 3 cable systems and no more than ten percent of the MSO's Form 2 systems.

(n) *Expanded audits.* (1) If the auditor concludes in his or her final report that there was a net aggregate underpayment of five percent or more on the Statements of Account examined in an initial audit involving a cable system or satellite carrier, a copyright owner may expand the audit to include all previous Statements filed by that cable system or satellite carrier that may be timely noticed for audit under paragraph (c)(2) of this section. The expanded audit shall be conducted using the procedures set forth in paragraphs (d) through (l) of this section, with the following exceptions:

(i) The expanded audit may be conducted by the same auditor that performed the initial audit, provided that the participating copyright owners provide the licensee with updated information reasonably sufficient to allow the licensee to determine that there has been no material change in the auditor's independence and qualifications. In the alternative, the expanded audit may be conducted by an auditor selected by the licensee using the procedure set forth in paragraph (d) of this section.

(ii) The auditor shall deliver his or her final report to the participating copyright owners and the licensee within five business days following the last day on which the licensee may provide the auditor with a written rebuttal pursuant to paragraph (i)(2) of

this section, but shall not be required to deliver the report by November 1st of the year in which the notice was published in the FEDERAL REGISTER pursuant to paragraph (c) of this section.

(2) An expanded audit of a cable system or a satellite carrier that is conducted pursuant to paragraph (n)(1) of this section may be conducted concurrently with another audit involving that same licensee.

(3) If the auditor concludes in his or her final report that there was a net aggregate underpayment of five percent or more on the Statements of Account examined in an initial audit involving an MSO:

(i) The cable systems included in the initial audit of that MSO shall be subject to an expanded audit in accordance with paragraph (n)(1) of this section; and

(ii) The MSO shall be subject to a new initial audit involving a sample of no more than thirty percent of its Form 3 cable systems and no more than thirty percent of its Form 2 cable systems, provided that the notice of intent to conduct that audit is filed in the same calendar year as the delivery of such final report.

(o) *Retention of records.* For each Statement of Account or amended Statement that a statutory licensee files with the Office for accounting periods beginning on or after January 1, 2010, the licensee shall maintain all records necessary to confirm the correctness of the calculations and royalty payments reported in each Statement or amended Statement for at least three and one-half years after the last day of the year in which that Statement or amended Statement was filed with the Office and, in the event that such Statement or amended Statement is the subject of an audit conducted pursuant to this section, shall continue to maintain those records until three years after the auditor

delivers the final report to the participating copyright owners and the licensee pursuant to paragraph (i)(3) of this section.

§201.17 [Amended]

3. Amend § 201.17 as follows:
 - a. In paragraphs (m)(2) introductory text and (m)(4)(i) by removing “(m)(3)” and adding in its place “(m)(4)”.
 - b. In paragraphs (m)(2)(ii), (m)(4)(iii)(C), and (m)(4)(iv)(A) by removing “(m)(1)(iii)” and adding in its place “(m)(2)(iii)”.
 - c. In paragraph (m)(4) introductory text by removing “(m)(1)” and adding in its place “(m)(2)”.
 - d. In paragraph (m)(4)(iii)(A) by removing “(m)(1)(i)” and adding in its place “(m)(2)(i)”.
 - e. In paragraph (m)(4)(iii)(B) by removing “(m)(1)(ii)” and adding in its place “(m)(2)(ii)”.
 - f. In paragraph (m)(4)(vi) by removing “(m)(3)(i)” and adding in its place “(m)(4)(i)”.

Dated: November 10, 2014.

Maria A. Pallante,
Register of Copyrights and
Director of the U.S. Copyright Office

Approved by:

James H. Billington,
Librarian of Congress

[BILLING CODE 1410-30-P]

[FR Doc. 2014-27277 Filed 11/17/2014 at 8:45 am; Publication Date: 11/18/2014]